91-1823

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHNNIE RANDALL JONES ..... *Petitioner*

VS.

JESS ODOM, SHERIFF OF
WHITE COUNTY, ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. VELEK
ATTORNEY AT LAW
BAR NO. 81159
P. O. BOX 5757
NORTH LITTLE ROCK, ARKANSAS 72119
(501) 377-7364
Attorney of Record

ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTIONS PRESENTED FOR REVIEW

I.

WHEN A CRIMINAL ACT IS DEFINED AS CONSISTING OF SEVERAL SEPARATE AND DISTINCT ESSENTIAL ELEMENTS, CAN PROOF OF SOME OF THOSE ELEMENTS BE CONSIDERED AS EVIDENCE FOR PROOF OF ANOTHER OTHERWISE UNRELATED ELEMENT? MORE SPECIFICALLY, WHERE D.W.I. LAW REQUIRES PROOF OF DRIVING WITH ALTERED MOTOR-SKILLS AND ALTERED JUDGMENT, DOES PROOF OF DRIVING WITH ALTERED MOTOR-SKILLS CONSTITUTE EVIDENCE OF ALTERED JUDGMENT?

II.

CAN A FEDERAL COURT DEFINE AN ESSENTIAL TERM CONTAINED IN A STATE LAW WHEN THE STATE ITSELF HAS FAILED TO DEFINE IT EITHER STATUTORILY OR BY STATE-COURT DECISION?

III.

ARE THE "BALANCE TEST" AND "COUNTING ON THE FINGERS TEST" VALID FIELD-SOBRIETY TESTS FROM WHICH THE COURT CAN REASONABLY INFER THAT "REACTIONS" AND "JUDGMENT" WERE SUBSTANTIALLY ALTERED, AND ALSO INFER THAT THIS CONSTITUTED A CLEAR AND SUBSTANTIAL DANGER?

IV.

WAS PETITIONER CONVICTED AND IMPRISONED WITHOUT ANY EVIDENCE OF CERTAIN ESSENTIAL ELEMENTS OF THE CRIME OF DRIVING WHILE INTOXICATED, THEREBY DEPRIVING HIM OF DUE PROCESS UNDER THE U.S. CONSTITUTION?

V.

ARE ALTERED "REACTIONS", ALTERED "JUDGMENT", AND "CLEAR AND SUBSTANTIAL DANGER" ESSENTIAL ELEMENTS WHICH THE STATE MUST PROVE TO OBTAIN A CONVICTION FOR DRIVING WHILE INTOXICATED AS DEFINED BY ARKANSAS LAW?

VI.

ARE THE MEANINGS OF "REACTIONS" AND "JUDGMENT" UNCONSTITUTIONALLY VAGUE, THEREBY ALSO RENDERING ARKANSAS' DEFINITION OF "INTOXICATED" AND ITS "DRIVING WHILE INTOXICATED" LAW UNCONSTITUTIONALLY VAGUE?

VII.

ARE ANY OF THE FOLLOWING EVENTS EVIDENCE OF LACK OF "JUDGMENT": REFUSAL OF CHEMICAL TEST, CONFUSION OVER LEGAL RIGHTS AND OBLIGATIONS REGARDING A CHEMICAL TEST, OR AN OFFICER'S REPETITION OF SOBRIETY TEST INSTRUCTIONS FOR AN UNDERSTANDING OF HOW TO TAKE THE TEST?

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OPINIONS DELIVERED BELOW

The Per Curiam Opinion of the U.S. Court of Appeals, 8th Circuit, in its case No. 91-2283, for which this writ of certiorari is sought, was not published; it is printed in its entirety at Appendix A hereto.

The original Judgment from the U.S. District Court, Eastern District of Arkansas, Western Division, in case No. LR-C-91-44, and the Court's supporting Memorandum and Order, neither of which were published, are printed in their entirety at Appendix B hereto.

No opinion was issued by the Arkansas Supreme Court when it denied petitioner's Petition for Review, so the only opinion issued by an Arkansas court in the underlying state-conviction and appeal was from the Arkansas Court of Appeals, case No. CA CR 89-311, which opinion was *not*

designated for publication, but which is printed in its entirety at Appendix C hereto.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

On February 11, 1992, a judgment was entered by the United States Court of Appeals for the Eighth Circuit, affirming a decision by the U.S. District Court, Eastern District of Arkansas, Western Division, which denied a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254; petitioner seeks a writ of certiorari for a review of that judgment. This Petition is filed within 90 days of entry of that judgment, and is therefore within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1), and Article III, Section 2, of the U.S. Constitution which grants the Supreme Court appellate jurisdiction, both as to law and fact, in all cases arising under the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the U.S. Constitution provides, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Amendment X to the U.S. Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XIV to the U.S. Constitution, Section 1, provides, in pertinent part, as follows:

> . . .nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATUTORY PROVISIONS INVOLVED

Arkansas Code Annotated §5-65-102 provides, in pertinent part:

> "Intoxicated" means influenced or affected by the ingestion of alcohol . . . to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

Arkansas Code Annotated §5-65-103, which provides two alternate methods of prosecution, states in pertinent part:

> (a) It is unlawful . . . for any person who is intoxicated to operate . . . a motor vehicle.
>
> (b) It is unlawful . . . for any person to operate . . . a motor vehicle if at that time there was one-tenth of one percent (0.10%) . . . alcohol in the person's blood as determined by a chemical test. . . .

APPLICABILITY OF U.S.C. SECTION 2403

The constitutionality of a state statute has been questioned and 28 U.S.C. Section 2403(b) appears to apply, however, the U.S. Court of Appeals has not certified that fact to the Arkansas Attorney General.

STATEMENT OF THE CASE

Petitioner was initially stopped for driving with a loud muffler, although there was no evidence of any improper driving. He was convicted in an Arkansas state court of Driving While Intoxicated (hereinafter D.W.I.); imprisoned, he sought and was denied habeas corpus by the U.S. District Court, as affirmed by the U.S. Court of Appeals. He now petitions for Certiorari.

There are only two bases for conviction of D.W.I. under Arkansas' law: a chemical test indicating at least one-tenth of one percent blood-alcohol content, or being "intoxicated" as expressly defined by Arkansas' statutory law.

Because Petitioner did not take a chemical test, the State had no means of proving blood-alcohol and therefore relied upon the definition-basis; under Arkansas law, that definition specifically requires that "reactions" and "judgment" be substantially altered, and the main issue for both appeal and in seeking habeas corpus was whether there was any evidence whatsoever to support such findings. In denying habeas, the U.S. District Court stated, "the confusion the officer observed, coupled with the petitioner's operation of a motor vehicle while in an impaired state, demonstrates a lack of judgment." (P.App. B-6) This is the basis for the first and primary issue raised in this petition, which appears to be of first impression: essentially, does proof of driving with altered motor-skills also constitute evidence of altered judgment?

When stopped, petitioner failed two field-sobriety tests: a "balance test" involving standing on one foot for thirty seconds and counting to thirty out loud, and a dexterity "counting on the fingers test" where the thumb is touched to each finger while counting to four and then backward. A third test — the "finger to nose test" — was also given, which he

passed. The validity of using such field-sobriety tests as a means of assessing "reactions" and "judgment" is another issue of first impression for this Court.

At trial, Petitioner moved for a directed verdict because no evidence of "reactions", "judgment", or resulting endangerment was presented, and neither the Prosecutor nor the State's witnesses ever referred to those elements either directly or indirectly; the trial court denied the Motion, but never made any findings concerning those abilities even though they were the specific basis for that motion. Later, the Arkansas Court of Appeals simply ruled evidence was sufficient, but gave no definition for those elements or any explanation of how the evidence applied to them except to state in general that it justified the inference of endangerment. (P.App. C-2)

When habeas corpus was sought, based upon denial of due process for lack of evidence to convict, the U.S. District Court "inferred" the elements of "reactions" and "judgment" from odor of alcohol, bloodshot eyes, confusion, and failed "balance test" and "counting on the fingers test" (P.App. B-5); the U.S. Court of Appeals also held that those elements could be "inferred" from the field-sobriety tests given. (P.App. A-2) At issue is whether altered "reactions" and "judgment" can reasonably be inferred from such field-sobriety tests which appear to be oriented primarily toward motor-skills; such an inference regarding a specific factual relationship has not been considered by this Court, and essentially is another one of first impression.

Specific references to "due process" under the U.S. Constitution were not made until the Petition for Habeas Corpus was filed, although Petitioner contends due process was not violated until he was first convicted and began his incarceration without sufficient evidence that he committed

a crime. Violation of his "due process" rights and the complete lack of evidence also remain an issue.

Finally, although Arkansas' statutory law neither defines nor further discusses the two elements of "reactions" or "judgment", the issue of vagueness was never raised in any state court because neither the prosecutor nor the Courts ever disclosed what meaning they attributed thereto. Vagueness did not become an issue until the U.S. District Court stated in its Memorandum And Order (P.App. B-6) that the very act of operating a motor vehicle while in an impaired state demonstrates a lack of judgment; the Court was addressing the Petitioner's assertion that there was no evidence of altered judgment. But Petitioner, contending that that is not the kind of judgment reasonably contemplated in the context of intoxication, raised the issue of vagueness for the first time before the U.S. Court of Appeals on the basis that in order to prove they have been altered it is first necessary to know what is meant by "reactions" and "judgment". Other issues for this Court, then, are whether a federal court can define an essential term contained in a state law when the State itself failed to define it, and whether Arkansas' definition of "intoxicated" is unconstitutionally vague because of its undefined elements. The Court of Appeals, in addressing that last issue, simply stated, without explanation, that such argument is meritless. (P.App. A-2)

ARGUMENT

SUBSTANTIAL FEDERAL QUESTIONS

A diligent search of the law regarding the issues raised in this petition has revealed no direct conflict between the decision in this matter by the U.S. Court of Appeals, 8th Circuit, and the previous decisions by this Supreme Court or any other U.S. Court of Appeals; however, by implication, the holdings of both the U.S. District Court and Court of Appeals, in light of the facts of this case, disregard doctrines established by this Supreme Court in the cases of *United States v. Menasche*, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S.Ct. 227 (1952); *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); and *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560 (1979). In addition, certiorari should be granted under Supreme Court Rule 10.1 (c) because the Court of Appeals decision also involved at least three substantial federal questions which apparently have not been settled by this Court, but which should be.

I.

WHEN A CRIMINAL ACT IS DEFINED AS CONSISTING OF SEVERAL SEPARATE AND DISTINCT ESSENTIAL ELEMENTS, CAN PROOF OF SOME OF THOSE ELEMENTS BE CONSIDERED AS EVIDENCE FOR PROOF OF ANOTHER OTHERWISE UNRELATED ELEMENT? MORE SPECIFICALLY, WHERE D.W.I. LAW REQUIRES PROOF OF DRIVING WITH ALTERED MOTOR-SKILLS AND ALTERED JUDGMENT, DOES PROOF OF DRIVING WITH ALTERED MOTOR-SKILLS CONSTITUTE EVIDENCE OF ALTERED JUDGMENT?

This issue is potentially applicable to a wide variety of

cases throughout the country because it concerns the entire spectrum of criminal law, both federal and state alike. It is, therefore, sufficiently special and important to warrant attention as per this Court's discretion. It involves a substantial federal question because it bears on due process rights under the 5th and 14th amendments to the U.S. Constitution; by lessening the State's rightful burden to prove each element of an offense as defined by law, people may be unjustly deprived of their liberty in cases where, in fact, those elements are really non-existent. In this case, Arkansas' D.W.I. law requires proof of driving with three simultaneously altered abilities: reactions, motor-skills, and judgment. This is in keeping with "the established principle that a court should 'give effect, if possible, to every clause and word of a statute'." *U.S. v. Menasche*, supra. Without any evidence bearing directly on judgment, but pertaining only to personal appearance and motor-skills, can a Court reasonably find altered "judgment" simply from a person's decision to drive with altered motor-skills? Virtually every case of D.W.I. inherently includes a decision to drive while in some state of impairment; is altered judgment *always* presumptive then? This would violate the very principle just cited above in *U.S. v. Menasche*, supra. It is clear from its Memorandum And Order that the U.S. District Court at least partially based its finding of altered judgment on Petitioner's "operation of a motor vehicle while in an impaired state" (See P.App. B-6); while the Court also based its finding upon confusion of Petitioner, it was the collective effect of both factors which the Court cited, giving no indication of the result if one were missing. This issue itself appears to be one of first impression, though it is closely related to the separate issue of inferences and presumptions, infra.

II.

CAN A FEDERAL COURT DEFINE AN ESSENTIAL TERM CONTAINED IN A STATE LAW WHEN THE STATE ITSELF HAS FAILED TO DEFINE IT EITHER STATUTORILY OR BY STATE COURT DECISION?

This issue is also potentially applicable to a wide variety of cases throughout the country because it includes civil cases as well as criminal, and is therefore also sufficiently special and important to warrant attention as per this Court's discretion. It involves a substantial federal question because it concerns the lack of authority of federal courts to establish state-law rather than to just interpret it; except for the purpose of delineating the constitutional bounds of a state-law which is otherwise within the scope of state-concern, whenever a federal court defines that law or its essential elements, even where a state legislature and state judiciary have both remained silent, the federal court is assuming the role of the state and is effectively dictating law to it in violation of the 10th Amendment to the U.S. Constitution. This is especially so where application of the ordinary meaning of a word is open to reasonable debate; in such a case, the federal court's only recourse is to declare the law unconstitutionally vague until it is further defined by the state. This is not to suggest that the federal courts have no authority to determine the meaning of words used in state laws; but in doing so, the determination should be limited to what the actual intent of the state legislature was, based on evidence presented to the Court, and also subject to this Court's doctrine of lenity toward a defendant in criminal cases. For additional support of its position that legislative intent should govern, Petitioner points to the practice of referring to Congressional intent when reviewing federal law, and cites *U.S. v. Universal*, supra, which said:

Very early Chief Justice Marshall told us, "Where the

> mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived • • •." *United States v. Fisher,* 2 Cranch 358, 386, 2 L.Ed. 304. Particularly is this so when we construe statutes defining conduct which entail stigma and penalties and prison. Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Why does Petitioner contend that a federal court has acted to define an essential term in this case? During argument of the first issue, supra, reference was made to the U.S. District Court's Memorandum And Order (P.App. B-6); the only meaning for "judgment" which can be discerned from the context of the Court's analysis is that it is at least broad enough to include something in the nature of wisdom and prudence. This is an overly-broad definition that is incompatible with the more limited one urged by Petitioner in his Reply To Response To Petition filed with that U.S. District Court (P.App. D-2 & D-3), which argued:

> Throughout the appellate process, the State has suggested or implied, as has the Respondent, that evidence of altered judgment took the form of the Petitioner's "confusion" about taking another breath-test. But if *understanding* of the law can constitute "judgment" in the context of our definition of intoxicated, then what about other forms of understanding;

> surely this would then be unconstitutionally vague. No; judgment in matters not related to driving skills could never have been intended; on the contrary, the *only* meaning which could reasonably have been intended is in regard to the judgment of such things as speed and distance, and whether it would be safe to pass another vehicle, or cross a road before approaching traffic. Any other interpretation would render this law unconstitutionally vague, for no one would know what is meant by "judgment" if reason cannot prevail.

In making its ruling, the U.S. District Court adopted the broader definition which presumably now includes all types of "judgment" that have very little to do with driving ability, such as when a person might become more gullible, or vulnerable when plied with liquor; this, of course, was a concomitant rejection of the narrower definition, which is the more reasonable one because it pertains only to those types of judgment which have a direct relationship to safe driving ability. The bottom-line is that an actual choice of meanings was made by a federal court, despite that the Arkansas legislature never made its meaning clear, and despite that neither of the Arkansas Appellate Courts gave any definition to the term, although urged to do so by Petitioner. Instead, the Arkansas State Courts conspicuously avoided this very subject; the Arkansas Court of Appeals did not mention such in its Opinion (P.App. C-1) and the Arkansas Supreme Court refused to grant review.

The U.S. District Court thus erred in failing to follow the doctrines previously established by this Court in *U.S. v. Universal*, supra, in these respects: it failed to base its holding on any evidence of legislative intent; it failed to give "judgment" a "commonsensical meaning"; and it chose the harsher alternative, of conviction and broader criminal culpability, without requiring the state legislature

to speak in language that is clear and definite.

In addition to rejection of the above-stated principles of this Court, such action by a federal court which imposes its own particular selection of a definition from among any number of reasonable alternative interpretations, constitutes encroachment into state-law in violation of the U.S. Constitution, 10th Amend.

III.

ARE THE "BALANCE TEST" AND "COUNTING ON THE FINGERS TEST" VALID FIELD-SOBRIETY TESTS FROM WHICH THE COURT CAN REASONABLY INFER THAT "REACTIONS" AND "JUDGMENT" WERE SUBSTANTIALLY ALTERED?

Although this issue of the validity of "field-sobriety" tests is only applicable to "Driving While Intoxicated" cases, it still involves the substantial federal question of due-process rights, and is also one of apparent first-impression to this Court.

The U.S. Court of Appeals (P.App. A-2) erroneously held that "the *tests* administered by the arresting officer provided sufficient evidence from which it could be inferred that Jones's [Petitioner] reactions, judgment, and motor skills were substantially altered, and that he constituted a danger *within the meaning of the statute*" (emphasis added); the only "tests" administered were field-sobriety tests, and danger "within the meaning of the statute" is specified as *clear* and *substantial*. This is not to say that inferences and presumptions are never proper; in this case, though, such an inference was improper for two reasons.

First, the effect of such an inference is to render

express language of the legislature null and void; this would clearly make it contrary to legislative intent, since the legislature cannot be presumed to have intended an absolute nullity. This "nullity" was already partly discussed during the first issue, supra, which dealt only with "judgment"; as already argued, based on the premise that virtually every case of D.W.I. *inherently* includes a decision to drive while in some state of impairment, this would mean that altered "judgment" would *always* be presumed whenever motor-skills or reactions are found to be impaired. But the Court of Appeals goes even further in nullifying the express provisions of statute; by inferring "reactions" and "clear and substantial danger", as well as "judgment", it reduces a compoundly-defined law to a simple requisite of driving while impaired. While this may comport with a common-law definition of D.W.I., it's a heck of a far cry from what the legislature *expressly* provided. Furthermore, the facts of this case can not support a finding of "clear" and "substantial" danger, for, as has consistently been argued both at trial and throughout all appeals, there was compelling evidence which indicated the contrary: no improper driving, passing of one field-sobriety test, and testimony from arresting officer that petitioner ". . . was acting in my opinion *a little bit* under the influence of alcohol . . ." (emphasis added).

Second, there is an insufficient relationship between the elements of "motor-skills", which the field-sobriety tests primarily test, and "reactions" or "judgment". Rationally, the element of "reactions", in the context of safe-driving, means the ability to respond quickly to changes in the traffic environment, while "judgment" would mean ability to assess speed and distances. Those are separate and distinct attributes, completely different from "motor-skills", which is precisely why the legislature enumerated all three of them and included the conjunctive "and". In the case of *Tot v. United States*, supra, this Court said:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

Whether it be a presumption created by express statute, as in *Tot*, supra, or an inference of a Court, as in this case, the same logic applies; there must be a rational connection. Petitioner would submit that there is a lack of connection between them in *common* experience; driving while intoxicated is not a common experience, and although intoxication by itself might be more common, there still must be a basis for relating the two. There is nothing to establish that the Court had any such basis for doing so; moreover, if such a relationship is so common to experience, would not the legislature have recognized that and simplified its definition?

IV.

WAS PETITIONER CONVICTED AND IMPRISONED WITHOUT ANY EVIDENCE OF CERTAIN ESSENTIAL ELEMENTS OF THE CRIME OF DRIVING WHILE INTOXICATED, THEREBY DEPRIVING HIM OF DUE PROCESS UNDER THE U.S. CONSTITUTION?

V.

ARE ALTERED "REACTIONS", ALTERED "JUDGMENT", AND "CLEAR AND SUBSTANTIAL DANGER" ESSENTIAL ELEMENTS WHICH THE STATE MUST PROVE TO OBTAIN A CONVICTION FOR DRIVING WHILE INTOXICATED AS DEFINED BY ARKANSAS LAW?

These two issues are related, and perhaps are appropriately to be considered as sub-issues of those already raised.

Petitioner simply contends that if this Court determines that altered judgment is an essential element of "intoxicated", in keeping with the principle stated in *U.S. v. Menasche*, supra, and if this Court also determines that altered judgment can *not* be "inferred" from the field-sobriety tests in this case nor proven simply by a decision to drive while impaired, then the State is left with no other evidence of altered judgment than the odor of alcohol and bloodshot eyes, from which *no* trier of fact could find the essential element of altered "judgment" and guilt beyond a reasonable doubt. *No* trier of fact could find altered "reactions", and *no* trier of fact could find "clear and substantial danger". Because of this complete lack of proper evidence, petitioner's conviction and imprisonment were in violation of his due process rights guaranteed by the 5th and 14th Amendments to the U.S. Constitution. See *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), holding that the test is whether any *rational* trier of fact could have found the essential element beyond a reasonable doubt after viewing evidence in light most favorable to prosecution.

VI.

ARE THE MEANINGS OF "REACTIONS" AND "JUDGMENT" UNCONSTITUTIONALLY VAGUE, THEREBY RENDERING ARKANSAS' DEFINITION OF "INTOXICATED" AND ITS "DRIVING WHILE INTOXICATED" LAW ALSO UNCONSTITUTIONALLY VAGUE?

For the reasons previously stated herein, Petitioner urges that the answer is "Yes", and in the event that this Court should grant certiorari and rule-out the federal court's definition of "judgment", then the Court will have no established parameters for measuring or determining the meaning of that term in the context of intoxication since neither the state legislature nor judiciary have defined it. This can only result in an uncertain legal definition which is unconstitutionally vague on its face.

VII.

ARE ANY OF THE FOLLOWING EVENTS EVIDENCE OF LACK OF "JUDGMENT": REFUSAL OF CHEMICAL TEST, CONFUSION OVER LEGAL RIGHTS AND OBLIGATIONS REGARDING A CHEMICAL TEST, OR AN OFFICER'S REPETITION OF SOBRIETY TEST INSTRUCTIONS FOR AN UNDERSTANDING OF HOW TO TAKE THE TEST?

The U.S. District Court, in denying habeas corpus, stated "Certainly, *the confusion the officer observed*, coupled with the petitioner's operation of a motor vehicle while in an impaired state, demonstrates a lack of judgment" (emphasis added). (P.App. B-6) The first issue already challenged the evidential value of merely deciding to drive while impaired and the propriety of drawing any inferences therefrom. This last issue concerns the only other factor so mentioned by the Court — "the confusion the officer observed".

Petitioner affirms that Appendix E, attached hereto, contains *all* relevant portions of the trial-transcript pertaining in any form or fashion to "confusion" in the broadest sense of the word. Petitioner will also assert that the said record, when taken in its best light for the prosecution, reflects only three *possible* bases for a finding of "confusion": refusal of a chemical test, confusion over legal rights and obligations regarding a chemical test, or an officer's repetition of sobriety test instructions for an understanding of how to take the test. Petitioner urges this Court to grant certiorari so that the complete record can be thoroughly examined to confirm testimony in this regard, contending there are legitimate reasons why the said circumstances are not reliable indicia of "judgment", and that it is important for this Court to closely examine the several legal considerations included within this final issue. For example, while refusal of

a chemical test might be admissible as circumstantial evidence that the defendant believed he might fail it, nevertheless it does not reflect upon "judgment"; on the contrary, it can be argued that one exercises proper judgment to refuse a test in which they lack confidence. In regard to confusion about legal rights, it goes without saying that many people are confused about the law; this may reflect one's mental capacity and knowledge, but certainly not "judgment".

Finally, the evidence is completely silent as to why the officer needed to repeat his sobriety-test instructions; perhaps the officer does not express himself clearly, or perhaps Petitioner *asked* him to repeat them because he wanted to be absolutely sure he understood them. Testimony also fails to indicate whether Petitioner failed because he misunderstood instructions or because of impaired motor-skills; it has already been argued, supra, that altered judgment should not be inferred from impaired motor-skills.

CONCLUSION

Petitioner proclaims his innocence, and insists that he was wrongly convicted without any evidence that he was an endangerment to himself or others by reason of altered reactions and judgment. This is an injustice which ought to be corrected, and certiorari should be granted for that sake alone.

However, petitioner also appreciates the impossibility of this Court's review of every just cause for justice sake alone, and has therefore presented this Court with mere introductory authority and argument on several vital issues of first impression — issues which should be reviewed because of wide-application to virtually all criminal and civil cases nationally. Petitioner should be permitted to more fully develop and present his arguments on these important issues of first-impression, and certiorari should issue to the U.S. Court of Appeals, 8th Circuit, so that this honorable Court may review and correct the decision below.

Respectfully submitted,

William J. Velek, No. 81159
Attorney at Law
P.O. Box 5757
North Little Rock, AR 72119
(501) 377-7364

Counsel of Record
for Petitioner

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-2283

Johnnie Randall Jones,	★	
	★	
Appellant,	★	
	★	Appeal from the United States
v.	★	District Court for the Eastern
	★	District of Arkansas.
Jess Odom, Sheriff,	★	(UNPUBLISHED)
White County, Arkansas,	★	
	★	
Appellee.	★	

Submitted: December 19, 1991

Filed: February 11, 1992

Before BEAM, Circuit Judge; HEANEY, Senior Circuit Judge; and LOKEN, Circuit Judge.

PER CURIAM.

Johnnie Randall Jones, an Arkansas citizen, appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. We affirm.

In January 1989, Jones was convicted at a state bench trial of driving while intoxicated, second offense. He unsuccessfully appealed his conviction to the Arkansas Court of Appeals. *See Jones v. State,* No. CA CR 89-311 (Ark. Ct. App. Sept. 12, 1990). Jones's petition for certiorari to the Arkansas Supreme Court was denied without opinion. In January 1991, Jones filed an amended petition for a writ of habeas corpus, claiming that incarceration violated his due process rights

because the state had failed to present any evidence that his reactions and judgment were substantially altered so that he caused a clear and substantial danger as required by Ark. Code Ann. §5-65-102(1) (Michie Supp. 1989).[1]

Upon careful review of the record, we conclude that the magistrate judge did not err in holding, viewing the evidence in the light most favorable to the prosecution, that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The magistrate judge correctly noted that the statute does not require proof of dangerous driving or presence of pedestrians and motorists to establish that Jones presented a danger. *See Oliver v. State*, 682 S.W.2d 745, 747 (Ark. 1985) (legislative intent to create a strict statutory scheme in which driving while intoxicated itself constitutes a serious and immediate threat to the safety of all citizens). The magistrate judge also correctly concluded that the tests administered by the arresting officer provided sufficient evidence from which it could be inferred that Jones's reactions, judgment, and motor skills were substantially altered, and that he constituted a danger within the meaning of the statute. *Cf. Long v. State*, 680 S.W.2d 686, 687 (Ark. 1984) (definition of intoxication provides police officers with sufficient standard for enforcement of statute). Jones's final argument that the courts have rendered the statute unconstitutionally vague is meritless.

Accordingly, we affirm.

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[1]The trial court sentenced Jones to 30 days in jail with 23 days conditionally suspended, imposed an $800 fine, and suspended Jones's drivers license for one year. Jones began serving his jail sentence on January 22, 1991 and filed his amended habeas petition on January 23, 1991. Because Jones was "in custody" under the challenged conviction at the time he filed his petition for habeas relief, we have jurisdiction over his claims under 28 U.S.C. §2254. *See Maleng v. Cook*, 490 U.S. 488, 490-92 (1989).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHNNIE RANDALL JONES ..... *Plaintiff*

vs. No. LR-C-91-44

JESS ODOM, Sheriff of
White County, Arkansas ..... *Defendant*

JUDGMENT

Pursuant to the Memorandum and Order filed in this matter this date, it is Considered, Ordered and Adjudged that this case be, and it hereby is, dismissed; the relief sought is denied.

DATED this 17th day of May, 1991.

/s/ John F. Forster, Jr.
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHNNIE RANDALL JONES ..... *Plaintiff*

vs. LR-C-91-44

JESS ODOM, Sheriff of
White County, Arkansas ..... *Defendant*

MEMORANDUM AND ORDER

Before the Court is a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. For the reasons stated below, the Court dismisses the petition.

On May 7, 1988, the petitioner was stopped by a State Police Officer while driving on a public highway because of an excessively noisy muffler. Upon questioning the petitioner about the muffler, the officer noticed the odor of alcohol about the petitioner. The petitioner had bloodshot eyes. The officer administered several field sobriety tests. According to the officer, the petitioner failed the balance test, which involves standing on one foot for thirty seconds and counting to thirty out loud. He also failed the "counting on the fingers" test, which tests an individual's ability to follow instructions. The officer had to explain the instructions to the petitioner a couple of times before he understood them, and during the test the petitioner missed numbers and did not touch his fingers as the officer directed. The plaintiff appeared to be confused. In the officer's opinion, the petitioner was intoxicated.

On January 26, 1989, the petitioner was convicted in the Municipal Court of Searcy, Arkansas, of driving while

intoxicated, second offense. He appealed to the Circuit Court of White County, Arkansas, and on August 22, 1989, he was convicted for the same offense and sentenced to thirty days in jail, with twenty-three days suspended upon specified conditions. He was fined $800, and his driver's license was suspended for one year.

He appealed his conviction to the Arkansas Court of Appeals and asserted that the evidence was insufficient to support his conviction. *Jones v. State*, No. CA CR 89-311 (September 12, 1990). In considering the petitioner's claim, the Court first cited Ark. Code Ann. Section 5-65-102(1) (Supp. 1989), which provides as follows:

> "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

The Court then noted the petitioner's specific contention that to be guilty of driving while intoxicated within the meaning of the statute, the evidence must establish that the driver is intoxicated to the point that all three of the specified abilities (reactions, motor skills, and judgment) are substantially altered, thereby creating a clear substantial danger to himself and others. The petitioner asserted that the evidence failed to establish all of the essential elements.

Next, the Court stated the relevant facts:

> The appellant was stopped by a State Police Officer while driving on a public highway because of an excessively noisy muffler. Upon questioning the appellant about the muffler, the officer noted the odor of alcohol about the

appellant. The officer then administered four field sobriety tests which he described in detail, and also described the manner in which the plaintiff failed two of the tests. The officer also testified that the appellant was confused, had difficulty following instructions, had bloodshot eyes, and in his opinion was intoxicated. There was no evidence that the appellant was driving badly at the time of the arrest. Upon being taken to the Searcy Police Department the appellant refused to take a blood alcohol test.

The Court then found that there was no merit to the petitioner's argument that there was no evidence that he was a danger because it is not necessary that a motorist be stopped for bad driving in order to prove he is a danger. Finally, the Court held that there was substantial evidence that the petitioner was operating a motor vehicle upon a public highway while intoxicated within the meaning of the statute and that the evidence justified an inference that under the circumstances he and others were endangered.

The petitioner filed a petition for writ of habeas corpus and a brief in support thereof on January 22, 1991, alleging that he is presently being incarcerated in the White County Detention Center in violation of his rights in that he is being deprived of his right to liberty without due process of law in violation of the fifth and fourteenth amendments because he has been convicted of a crime and sentenced even though the State has failed to present any evidence to support the essential elements of driving while intoxicated.[1] Specifically, he contends that the State has failed to present any evidence

[1]The Court notes that on January 23, 1991, the petitioner filed an amended petition, which contains essentially the same arguments presented in his initial petition. The Court also notes that the respondent, in a motion to dismiss filed on February 4, 1991, states that the petitioner was released from incarceration on January 26, 1991.

that his "reactions" and "judgment" were substantially altered and that he constituted a "clear and substantial danger of physical injury or death to himself and other motorists or pedestrians" as required by Ark. Code Ann. Section 5-65-102(1).

In reviewing a challenge to the sufficiency of the evidence, a federal habeas court reviews the evidence in a light most favorable to the prosecution, and the critical question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Moreover, a judgment by a state appellate court rejecting a challenge to the sufficiency is entitled to deference by federal courts. *Id.* at 323; *Wallace v. Lockhart*, 701 F.2d 719, 728 (8th Cir. 1983).

The Court first notes that the petitioner's contention is well conceived and argued. However, after examining the relevant facts of record, the language of Section 5-65-102(1), and the relevant case law, the Court finds that the petition should be dismissed.

The petitioner contends that the tests administered by the officer did not measure reactions and judgment and that the State failed to prove that his reactions and judgment were substantially altered. The Court disagrees. The officer testified that the plaintiff had the odor of alcohol about him and bloodshot eyes, that he failed a balance test and "counting on the fingers" test, that he had difficulty understanding and following instructions, missed numbers, and did not touch his fingers as the officer directed on the "counting on the fingers" test, and that he was confused. From this evidence, it can be reasonably inferred that the plaintiff's reactions, judgment, and motor skills were substantially altered and, therefore, he constituted a "clear and substantial danger of physical injury

or death to himself and other motorists or pedestrians."[2] Certainly, the confusion the officer observed, coupled with the petitioner's operation of a motor vehicle while in an impaired state, demonstrates a lack of judgment.

The petitioner also asserts that there was no proof concerning improper driving, impairment of driving, inability to drive, dangerous conditions, or the presence of other motorists and pedestrians. In short, the code provision does not require proof of these elements.

Accordingly, the Court dismisses the petitioner's petition and amended petition for writ of habeas corpus.

IT IS SO ORDERED this 17th day of May, 1991.

/s/ John F. Forster, Jr.
United States Magistrate Judge

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[2]In *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985), a police officer found the appellant asleep behind the wheel of a car, which was lodged against a building in a parking lot. The car and the building were damaged. The officer awakened the plaintiff. The officer testified that the appellant smelled of intoxicant, was unsteady on his feet, spoke in a slurred manner, and had to be "wrestled" from his position behind the steering wheel. The Supreme Court of Arkansas held that the evidence was sufficient to prove that the appellant was intoxicated.

APPENDIX C

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

DIVISION II

Arkansas Court of Appeals

Johnnie Randall Jones, *Appellant.*

vs. No. CA CR 89-311

State of Arkansas, *Appellee.*

Opinion delivered September 12, 1990.

Appeal from White County Circuit Court (No. CR 89-36)

Honorable Cecil A. Tedder, Jr., Circuit Judge; Affirmed.

ERNIE E. WRIGHT, Acting Chief Judge. Appellant was convicted in the Municipal Court of Searcy of driving while intoxicated, second offense. On appeal to the circuit court in a *de novo* trial before the trial judge he was convicted for the same offense. Appellant was sentenced to thirty days in jail, with twenty-three days suspended upon specified conditions. He was fined $800 and his driver's license was suspended. Appellant moved for a directed verdict at the conclusion of the state's evidence and declined to present evidence.

On appeal, appellant asserts the evidence was insufficient to support the conviction. It is undisputed that appellant was driving a motor vehicle on a public highway and the issue centers on whether he was at the time intoxicated as defined by Ark. Code Ann. §5-65-102(1) (Supp. 1989), which reads as follows:

"Intoxicated" means influenced or affected by the

> ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians[.]

Appellant argues that to be guilty of driving while intoxicated within the meaning of the statute the evidence must establish that the driver is intoxicated to the point that all three of the specified abilities must be substantially altered, i.e., reactions, motor skills and judgment, thereby creating a clear substantial danger to himself and others. He contends the evidence fails to establish all of these essential elements.

We disagree with appellant's contentions as to the sufficiency of the evidence and affirm the judgment.

The appellant was stopped by a State Police Officer while driving on a public highway because of an excessively noisy muffler. Upon questioning appellant about the muffler, the officer noticed the odor of alcohol about the appellant. The officer then administered four sobriety tests which he described in detail, and also described in detail the manner in which appellant failed two of the tests. The officer also testified that appellant was confused, had difficulty in following instruction, had bloodshot eyes, and in his opinion was intoxicated. There was no evidence that appellant was driving badly at the time of the arrest. Upon being taken to the Searcy Police Department the appellant refused to take a blood alcohol test.

For reversal appellant stresses that appellant was not stopped because of dangerous driving but for a loud muffler, and that there was no evidence that he was a danger. The argument is without merit. It is not necessary that a motorist

be stopped for bad driving in order to prove that he is a danger. In fact, in the case of *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988) the appellant was not driving, but was sitting in the front seat with the motor running. There was, as here, evidence that he was intoxicated.

On appeal of a criminal conviction by the trial judge sitting without a jury we view the evidence and all permissible inferences to be drawn therefrom in the light most favorable to the state and affirm if there is substantial evidence to support the verdict. *Holmes v. State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985). There was substantial evidence that appellant was operating a motor vehicle upon a public highway while intoxicated within the meaning of the statute and the evidence justified the inference that in the circumstances he and others were endangered.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHNNIE RANDALL JONES ..... *Petitioner*

vs. Case No. LR-C-91-44

JESS ODOM, Sheriff of
White County, Arkansas ..... *Respondent*

REPLY TO RESPONSE TO PETITION

Comes now the Petitioner, Johnnie Randall Jones, by and through his attorney, William J. Velek, and for his Reply To Response To Petition, states as follows:

1. Petitioner agrees with Respondent's recitation of facts and contentions contained in numbered sections I through V, and affirmatively states that Respondent's denial of completed portions of sentence is not relevant to the issue pending before this Court;

2. Regarding argument by Respondent in section VI thereof, said section is a word-for-word repetition of argument contained in Respondent's previous Motion To Dismiss which was already disposed of by this Court when it denied the Motion To Dismiss, stating that allegations of insufficiency of evidence amount to an allegation of a violation of due process, cognizable on federal habeas review (page 2 of Court Order entered on March 11, 1991);

3. Regarding argument by Respondent in section VII thereof, Petitioner will concede every single point of law cited, none of which address the real issue in this case, and none of which refute the contention of Petitioner that *no* evidence was presented to prove certain elements essential to a finding

of intoxication as defined by Arkansas Code Annotated §5-65-102(1) (Supp. 1989). In making such concessions, however, there are certain caveats which also apply, as follows: . . . while the critical question is whether *any* rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt, those essential elements must still be recognized and each one supported by *some* evidence; . . . while state appellate courts are entitled to great deference, they are *still* subject to review and *must* be reversed when in violation of the U.S. Constitution; . . . while Mr. Jones may not be entitled to a hearing (none is asked for), he *is* entitled to this habeas review; . . . while this Court must defer to the trial court's findings of credibility and resolution of conflicts in testimony, credibility and conflicting testimony are *not* issues in this case, but rather here we are concerned only with whether there was a *lack* of *sufficient* testimony. No cases are cited in support of interpretation of "judgment" or "reactions," this being a case of first impression in this regard. Nor does Respondent offer any argument of any kind to refute our contention that "judgment" or "reactions" are not even *capable* of being gauged or measured by the means utilized in this case — by common field-sobriety tests and testimony of facts indicative of "motor skills" or appearance. The entire substance of the Respondent's argument boils down to a stubborn blind-insistence that there was sufficient evidence to support this conviction, completely disregarding the argument of the Petitioner. Why? Because there is no legitimate counter-point to Petitioner's argument — because there simply is no method currently in use to gauge or measure "judgment" or "reactions," and consequently none to show when they have been substantially altered by ingestion of alcohol, thereby constituting a clear and substantial danger. This is *clearly* and *expressly required* by Arkansas' definition of intoxication, as set forth in A.C.A. §5-65-102(1).

Throughout the appellate process, the State has

suggested or implied, as has the Respondent, that evidence of altered judgment took the form of the Petitioner's "confusion" about taking another breath-test. But if *understanding* of the law can constitute "judgment" in the context of our definition of intoxicated, then what about other forms of understanding; surely this would then be unconstitutionally vague. No; judgment in matters not related to driving skills could never have been intended; on the contrary, the *only* meaning which could reasonably have been intended is in regard to the judgment of such things as speed and distance, and whether it would be safe to pass another vehicle, or cross a road before approaching traffic. Any other interpretation would render this law unconstitutionally vague, for no one would know what is meant by "judgment" if reason cannot prevail.

Likewise, what is meant by "reactions"? Reason would dictate that this be interpreted in the context of driving a motor vehicle. It should not mean one's sensibilities, reflexes, or allergic reactions; our legislators surely must have been interested in how quickly one would "react" if a child ran in front of the vehicle, or another vehicle suddenly swerved into one's lane, etc. This would connote a timed test of some sort. It can't be measured by how well a person can stand on one foot, or touch their finger to their nose, etc. This is the law that our state legislators gave us, whether it is easy or difficult to comply with. It is not for the Courts to change, it is not for the Courts to second guess, but it *is* for the Courts to uphold; the Petitioner has a right to be acquitted of Driving While Intoxicated if the State cannot prove that his "judgment" and "reactions" were substantially altered, and by no stretch of the imagination have they even begun to meet that burden.

WHEREFORE, the Petitioner prays that his petition for habeas corpus be granted forthwith without delay, that his

conviction for Driving While Intoxicated be thereby reversed on grounds of denial of due process, and for all other proper relief to which he may be entitled.

Respectfully submitted,

William J. Velek, Attorney
P.O. Box 5757
North Little Rock, AR 72119

APPENDIX E

EXCERPTS OF PERTINENT TRIAL TESTIMONY

The following excerpts of trial testimony are taken from the portions of the state-court trial-transcript which were included in the parties' Joint-Appendix to the U.S. Court of Appeals; an entire transcript had been provided to the U.S. District Court upon which it based its decision in that no hearings were held before the said District Court. Page numbers refer to the said Joint-Appendix.

DIRECT-EXAMINATION OF ARRESTING OFFICER MANESCO BY STATE [A-61 to A-62]

Q. The next test, describe how he performed it?

A. On the Counting on the fingers, in my opinion he did not pass that test. Part of my test is the individual's ability to follow instructions, and I had to explain that to him a couple of times before he understood what I was advising him to do, and then he did not perform that well.

Q. Did he atempt to perform it?

A. Yes, sir.

Q. Can you give an example of how he might have messed up on the test?

A. Yes, sir, such as count 1, 2, 3, 4, then 4, 3, 2, 1, as he would miss numbers and not touching his fingers as I directed him to do.

Q. So your opinion is on that test?

A. He failed it.

CROSS-EXAMINATION OF ARRESTING OFFICER MANESCO BY DEFENSE [A-67 to A-68]

Q. When I heard your responses it appears they were given with candor and truthfulness, and it indicated that this man basically did a fair job when you put them all together, was that not true?

A. Well, in my opinion it wasn't good enough for me at my observations. Like I say, a lot has to do with potential to follow instructions.

Q. Yes, sir, and if they don't follow exactly the way you want them to do, that counts against them, is that correct?

A. I monitor them on instructions, being able to do that. It's not necessarily on instructions alone, but you take that into consideration if I have to explain two or three times.

DIRECT-EXAMINATION OF OFFICER SPURLOCK BY STATE [A-81 to A-82]

Q. Show you what I have marked Plaintiff's Exhibit 1 for identification purposes. Do you recognize that form?

A. Yes, sir, that's a statement of rights I read to the subject that night.

Q. How did you go over this with him?

A. Read it word for word to him.

Q. Couple questions on there, are there not, at the end of the rights statement?

A. Yes, sir.

Q. First one is asking him if he understands all the parts of the rights?

A. Yes, sir.

Q. What did he indicate to you?

A. Yes.

Q. And then you asked him if he would take the test, and what did he indicate?

A. He said no.

Q. Was there any anything from him that indicated he didn't understand what you were wanting him to do, or was it a qualified no? Or just a flat out no, I ain't going to take your test?

A. Well, he said he had taken a test out there on the road and that was enough, he wasn't taking any more.

DIRECT-EXAMINATION OF
OFFICER EDMONSON BY STATE [A-87 to A-88]

Q. Were you present when these rights were gone over?

A. Yes, sir.

Q. Who went over them?

A. Steve Spurlock read the form to him, he then refused it, and I again asked him about it, and he still affirmatively refused to take the test.

Q. Were the rights read to him word for word, or summarized?

A. Yes, sir, they were read to him as printed there, and then went back and summarized again.

Q. There's a question that indicates asking him if he understood all parts of the rights, and there's a mark in the "yes" block. Did you understand it that he understood the rights?

A. Yes, sir.

Q. Was there any question about whether he understood the rights or not?

A. He said he did, and I feel like he did.

Q. The question was asked will you take the test. Was there any discussion about it, yeah, I will take it, maybe, or did he just flat out say no, I won't, or did he attempt to take it?

A. He said he had took one and he would not take another test.

Q. Did he indicate what he was talking about?

A. He appeared to me somewhat confused. I can only allude that it was something the trooper had done earlier.

Q. Did you attempt to give him another test before this one?

A. No, sir, I indicated he was required to take the one I was offering to him at that time, and he said he would not.

[Continuing same witness, with pertinent questions, at A-90]

Q. Mr. Edmonson, it's been awhile back. Do you recall enough about Mr. Jones to form any opinion as to whether he was intoxicated or not intoxicated at the time you were attempting to give him the test, and if you formed an opinion, we need to get into first some basis for that opinion.

A. There was an odor of intoxicants about his person. As I indicated earlier, he appeared somewhat confused. He stated that he understood his rights, but he kept going back and forth. His eyes were bloodshot. If I had been asked to make a judgment, I would have brought him in for a test also.

CROSS-EXAMINATION OF
OFFICER EDMONSON BY DEFENSE [A-92 to A-93]

Q. You were a certified officer to run a test that did not get run?

A. Yes, sir.

Q. And did you state two different times that the defendant appeared to be confused?

A. Yes, sir.

Q. He also told you and you heard him say he had already taken a test out on the road?

A. Yes, sir.